Q. MISCELLANEOUS CASES OF INTEREST

U.S. v HARRIS (Retention of Field Notes) bulletin no. 4. The federal courts in a 9th Circuit case, require officers to retain their field notes because the notes are evidence to which the defendant is entitled.

MORRELL v State (Duty of Defense Attorney to Disclose Evidence to District Attorney) bulletin no. 14. The defense attorney has a responsibility to furnish physical evidence to the prosecutor.

YOUNGBLOOD v West Virginia (Duty of Police to Collect and Provide Exculpatory Evidence) bulletin no. 312. Defendant, who raised consent as a defense, was convicted of sexual assault and other charges. He received a sentence of 26 to 60 years imprisonment. Several months after the conviction, the investigator who worked the case, was contacted by an individual who had a note from two of the victims that stated (the victims) "had played him (the defendant) for a fool and thanked him for performing oral sex on one of the victims." The investigator told the informant he did not need the note and instructed the person to destroy it. The Brady v Maryland rule requires the government, including the police, to disclose evidence favorable to the defense.

LISTON v State (Seizure of Palm Prints of Defendant While In Custody) bulletin no. 65. The defendant, while in custody, had his palm prints seized without a court order. The prints are compared and subsequently identified with latent prints that were lifted from another crime scene.

Anchorage v LLOYD (Carrying Concealed Weapon) bulletin no. 81. The Court upheld the Municipality of Anchorage ordinance regarding the carrying of a concealed weapon. This particular ordinance is more stringent than the Alaska State statute regarding same offense.

WARDEN v Williams (Inevitable Discovery) bulletin no. 85. While the police were searching for a body, the defendant confessed to the crime and led police to the exact location of body. The confession was ruled inadmissible, however, the body or photographs of it were not suppressed as "fruits of the poison tree" because the police were searching in the area and would have discovered the body without the defendant's assistance.

U.S. v LEON and Massachusetts v SHEPARD ("Good Faith" Exception to Exclusionary Rule) bulletin no. 86. Although the magistrate in the Leon case issued the warrant on the basis of ample probable cause as detailed in the affidavit of support of the warrant, the reviewing court did not agree. The Shepard case involved a warrant that contained several technical defects. In both cases, the requesting officers had sought assistance from their respective district attorney offices. The issuing magistrate in the Shepard case was aware of the technical defects. In both cases, the U.S. Supreme Court allowed the evidence to be admitted while recognizing the Exclusionary Rule (See Mapp v Ohio, 367 US 643) as a principal mode of discouraging lawless police conduct, but maintained that its major impact was a deterrent to police misconduct. In both cases, the police officers followed procedure as required. The errors, if any, were attributed to the issuing magistrates not the police officers.

Malley and Rhode Island v BRIGGS (Possible Civil Liability For Officers Who Obtain A Warrant Lacking Probable Cause) bulletin no. 101. The Court ruled that monetary damages against the police could possibly be awarded under 42 1983 (Federal) suit. It should be noted that police officers seeking warrants that they know lack probable cause could be the subjects of civil suits.

Maryland v GARRISON (Description of Premises to be Searched as Well as Persons or Things to be Seized) bulletin no. 109. Police had a warrant to search a third floor apartment. Police believed there was only one apartment on the floor and in the process of searching what they believed to be that apartment they discovered they were, in fact, searching a second apartment and upon discovery discontinued the search. Evidence seized from the second apartment not named in the warrant was allowed. The warrant was valid when issued, the officers were not aware of the second apartment and the court allowed latitude for the HONEST MISTAKE.

McLAUGHLIN v State (Entrapment/Right to Counsel and to Remain Silent) bulletin no. 113. When an officer receives calls from a defendant awaiting trial, Sixth Amendment rights do not protect the defendant when the defendant, now suspect, embarks on new criminal ventures, especially when the defendant initiated the contacts.

BUSBY v Anchorage (Duty To Take Persons Incapacitated by Alcohol into Protective Custody) bulletin no. 115. Police officers have a duty to take persons into protective custody who are incapacitated by alcohol when a statute enunciates the appropriate action to be taken when a person meets the criteria described in the statute.

WARD v State (Failure to Obtain Independent Blood Test as Requested by OMVI Defendant) bulletin no. 122. A person arrested has the right to an independent blood test by a person (facility) of his or her own choosing, not necessarily the facility contracted by the police department to conduct such tests.

SKINNER, Secretary of Transportation v Railway Labor Executives Union; **NATIONAL TREASURY EMPLOYEES UNION v Von Raab, US Customs Service**; **LUDTKE v Nabors Drilling** bulletin no. 129. Government regulations pertaining to railroad employees that require warrantless mandatory drug/alcohol screening does not violate Fourth Amendment rights if the compelling government interests outweigh privacy concerns, such as safety sensitive tasks. In the case of the US Custom Service, results of drug testing are not available for law enforcement prosecution, but are used to detect drug use prior to assignment of personnel to sensitive positions. In both cases the public interest is balanced against the individual's privacy and, in both cases, warrants were not required.

In LUDKE v Nabors Drilling, the Alaska Constitution does not extend the right of privacy to the actions of private parties. In this case, drug testing is conducted during working hours and is related to safety work issues rather than overall controlling of illegal drug use. In addition, the policy was clearly stated to all employees prior to implementation. The drug testing policy was upheld.

GUNDERSEN v Anchorage (OMVI Defendant's Right to Independent Blood Test) bulletin no. 143. A defendant must be given an opportunity to challenge the reliability of the breath test via an independent test. The defendant declined to take an independent test, even though an opportunity was given to the defendant to obtain an independent test and assistance in obtaining the test was offered. As a result, the Intoximeter results could be used as evidence even though the initial breath sample was not preserved.

Michigan State Police v SITZ, et al (Sobriety Checkpoint) bulletin no. 144. All vehicles passing through a checkpoint were briefly stopped and drivers examined for signs of intoxication. These stops did not violate the Fourth Amendment because 1) checkpoints were selected pursuant to guidelines and all vehicles were stopped; 2) data indicated the stops would promote roadway safety; and 3) the State's interest in preventing drunk driving outweighed the degree of intrusion upon individual motorists. This stop was classified as an "investigatory" stop. The Alaska Court of Appeals might not reach the same conclusion since "investigatory" stops are not allowed without probable cause (as opposed to reasonable suspicion) unless imminent public danger exists.

DeNARDO v State (State Statute Prohibiting Carrying a Concealed Weapon) bulletin no. 164. The State statute, which prohibits carrying a deadly weapon “concealed on the person,” includes a deadly weapon carried in a briefcase, purse or other hand-carried container.

JACOBSON v U.S. (Entrapment) bulletin no. 169. In 1984, the defendant ordered two magazines containing nude photos of young boys at a time when this was a legal purchase. Over a 2-1/2 year period, postal inspectors made repeated efforts to explore the defendant's willingness to break the law by ordering sexually explicit magazines and he finally ordered a magazine. Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act and then induce the commission of a crime. The prosecution must prove that the defendant was disposed to commit the crime before providing the opportunity for a suspect to commit a crime.

D. W. v State ("Catch All" Exception to Hearsay Rule) (no bulletin). The Department of Health and Human Services brought a suit against D. W. when it was learned that he had sexually assaulted his two daughters A.S.W. and E.W. The Superior Court ruled that the two daughters were "children in need of aid" and awarded custody to their mother. D.W. appealed the ruling on the grounds that a videotaped statement given to the police by A.S.W. (lasting about one hour) was played for the judge. Because A.S.W. did not testify at a hearing, he argued that he was denied his right to confront and cross-examine witnesses. The Supreme Court ruled that the videotaped statement was properly admitted under the "catch all" exception to the hearsay rule (AK Evidence Rule 804 (b) (5)).

DEZARN v State (Exception to Hearsay Rule) bulletin no. 170. Soon after being sexually abused by her mother's live-in boyfriend, a two-year-old girl told her mother what happened but, during trial, the two year old could not meaningfully relate the circumstances of the abuse. The mother was allowed to testify on behalf of her daughter under one of the Hearsay Exceptions, Excited Utterance. In order to be admissible, an excited utterance must be made under a condition "which temporarily stilled the capacity for reflection and produced utterances free of conscious fabrication." Excited utterances are usually not the product of questioning, but in this case a neutral and non-suggestive "What's wrong" was used to prompt a response.

HAZELWOOD v State (Immunity - Inevitable Discovery/Independent Source) bulletin no. 171. The Exxon Valdez ran aground and HAZELWOOD, the captain, reported the spill to the Coast Guard. Under Federal law, this reporting granted HAZELWOOD immunity as a matter of law. Under the independent source rule, "once immunity is shown, the State must prove that evidence was developed or obtained from sources or by means entirely independent of and unrelated to the earlier compelled testimony" in order to show that HAZELWOOD was not entitled to immunity. This burden of proof was not satisfied. This case was REVERSED. See bulletin no. 183.

JEFFERY ANDERSON v State (ZEHRUNG affirmed – right to post bail prior to booking; inevitable discovery doctrine applies because defendant would have been booked anyway) bulletin no. 282. Subject arrested on outstanding F/A warrant; bail $1,000. Officer failed to inform defendant that he would be given a reasonable opportunity to post bail prior to booking. Corrections officer found a Tupper-ware container containing white powder. The container was given to the arresting officer. Laboratory test later confirmed presence of methamphetamine. Officer then informed defendant of his right to bail. As it turned out defendant was unable to post bail and remained in jail for 4 days. Court ruled that ZEHRUNG still applies and that the officer should have informed ANDERSON of his right to post bail prior to booking but also said the evidence could be admitted under “inevitable discovery doctrine” because the evidence would have been found during the booking process.

JOHNSON v Fairbanks (Improper State/Federal Seizure of Suspected Drug Money for Administrative Forfeiture) bulletin no. 176. Johnson was arrested for a DV assault charge outside his residence and drugs seized in the residence with a search warrant were suppressed due to an illegal entry on the part of the police. The seized money was turned over to the DEA prior to dismissal of the charges. The State may only transfer seized property to the DEA after it has completed forfeiture proceedings, and since the State court was the first to have jurisdiction over the property and the transfer violated State law, the DEA's forfeiture had no effect. The money was returned to the defendant.

AUSTIN v U.S. (Federal Seizure of Real Property for Administrative Forfeiture) bulletin no. 179. The excessive fines clause of the Eighth Amendment applies to federal forfeiture of property used to facilitate the distribution of drugs. In effect, you must demonstrate that the property seized was purchased from drug sales profits or demonstrate the profits from drug sales are the defendant's sole source of income to avoid excessive punishment that the excessive fines clause was designed to prevent.

HAZELWOOD v State (Immunity - Inevitable Discovery/Independent Source) bulletin no. 183. See bulletin no. 171. The Supreme Court ruled in two parts: 1) affirmed the court's decision (granting immunity by Federal Statute) pertaining to the "independent source" because he reported the spill over the radio; and 2) overruled the decision that the "inevitable discovery doctrine" did apply. This issue is: would the evidence of the spill been inevitably discovered without reference to immunized statements? The answer was yes, since

Congress did not rely solely upon the grant of immunity to encourage the reporting of spills since failure to report is a criminal act.

LIBRETTI v U.S. (Forfeiture of Property and Money Pursuant to Negotiated Plea of Guilty) bulletin no. 195. Libretti pled guilty and agreed to forfeit property. Although he was advised of the consequences of waiver of a jury trial, he was not advised of his right to a jury determination of forfeitability under Federal law. In this case, the plea agreement was clear in that the plea agreement would lead directly to sentencing and would end all proceedings.

WASKEY v Anchorage (Civil Allegations of Constitutional Violations, False Arrest and Imprisonment) bulletin no. 196. WASKEY was arrested and he used his brother's name. WASKEY failed to appear and his brother was later arrested and jailed for 10 days. The charges were later dropped after proper identification was made. The arresting officer does not owe a duty of care in tort to ensure that people arrested are who they say they are and, therefore, the arresting officer was not negligent. There was no claim of false arrest since the Municipality obtained an arrest warrant.

BENNIS v Michigan (Forfeiture - Innocent Owner Defense) bulletin no. 200. Michigan's abatement law does not violate the 14th (due process) or 5th (taking her interest for public use without compensation) Amendments to the U.S. Constitution. In general, innocent owners of property are exempt from federal forfeiture laws as long as they can prove they did not know their property was being used for illegal purposes.

U.S. v URSERY and $405.089.23 (Civil Forfeitures Do Not Constitute Double Jeopardy) bulletin no. 201. Civil Forfeiture does not constitute punishment for purposes of the double jeopardy clause.

KNIX v State (Perjury by False Sworn Statement) bulletin no. 204. The defendant made a statement to a State DPA employee (not a peace officer) and signed the statement declaring, "Under penalty of perjury, this is a true and accurate statement." The employee was a notary and he affixed his notary seal. The statement was later found to be false and even though the State employee did not administer an oath or affirmation, it was determined that the statement qualified as a "sworn statement."

HARRISON v State (Perjury by Unsworn and Not Notarized Statement) bulletin no. 205. The defendant made a sworn statement under AS 9.63.020 stating "under penalty of perjury" that the statement was true and correct. He later (being arrested and convicted) claimed the statements were not true, that they were not sworn statements because he did not swear to them before a notary or other official. The statement was found to be a sworn statement as a matter of law.

SNYDER v State (DWI Defendant's Right to Independent Blood Test) bulletin no. 213. Police must now allow a defendant the opportunity to obtain an independent test of his blood alcohol content regardless of the fact that a breath test was not obtained for whatever reason.

ERICKSON v State (Multiple Convictions for Sexual Assault Involving the Same Victim During Single Episode) bulletin no. 220. A defendant was convicted of four counts of sexual abuse during one incident since each incident alleged a different form of penetration. Since each form of penetration was different, it supported four distinct convictions.

BALLARD v State (Court Upholds Use of Horizontal Gaze Nystagmus Test – With Qualifications) bulletin no. 224. The validity of the HGN test was upheld as long as the test is not used to quantify the level of intoxication and is given the same weight as other field sobriety tests.

Sacramento County v LEWIS (High Speed Police Chases) bulletin no. 227. A police chase of a motorcyclist resulted in the death of the passenger after having been run over by the police vehicle after the motorcyclist crashed. High speed chases, with no intent to harm, do not give rise to liability under the 14th amendment, even if department policy was violated.

State v COON (Admissibility of Voice Spectrographic Analysis Evidence) bulletin no. 231. Voice analysis was introduced in this case which was determined to be generally accepted within the scientific community

based on: 1) judicial opinions; 2) scientific literature; and 3) expert testimony presented at an evidentiary hearing.

FLORIDA v T. White (Forfeiture of Vehicle Pursuant to Statute) bulletin no. 233. Police had probable cause to believe vehicle contained contraband and, based on Florida (forfeiture) statute, seized it without benefit of a warrant from "public place."

WILSON v U. S. Marshall et. al (Media Ride-Along Programs Violate Fourth Amendment) bulletin no. 234. Media was on a ride-along and accompanied officers into residence during the execution of arrest warrant. WILSON and his wife brought civil (1983) suit alleging violation of their (privacy) Fourth Amendment Rights. Court agreed, it did violate their rights.

MacDONALD v State (Domestic Violence Protective Order) bulletin no. 237. Police attempted to serve court order, but were unable to locate MacDONALD. MacDONALD was aware of the existing order. He was subsequently charged with violation of the order and argued that because he was never formerly served he should not be prosecuted for the violations. Court disagreed, so long as he was aware of the existing order, he can be successfully prosecuted even though he was never formerly served.

SAMANIEGO v Kodiak (Excessive Force) bulletin no. 242. Kodiak police used excessive force when they arrested SAMANIEGO. The police were assisting INS in the immigration status of other subjects when she drove by and asked what was going on. She was ordered out of her car and subsequently arrested. She received injuries as a result of the arrest.

CRAWFORD, Keane-Alexander v Kemp and State (Police Officers are Not Entitled to Civil Immunity on Cases Involving False Arrest, etc.) bulletin no. 314. CRAWFORD refused to identify himself to a trooper who was looking for a person (in the court clerk's office) for violation of a domestic violence violation. CRAWFORD was in the clerk's office preparing a court paper for his divorce. When he refused to identify himself, the trooper looked over his shoulder to read the paperwork that CRAWFORD was preparing. CRAWFORD responded by, in a loud voice, saying "you should be proud of yourself that you can read over peoples shoulders." The situation escalated when CRAWFORD asked the trooper for his name. CRAWFORD left the clerk's office, went to the Judicial Services office and obtained the name of the trooper's (KEMP) supervisor. CRAWFORD returned to the clerk's office and informed KEMP that he had obtained the name of his supervisor and indicated that he was going to file a complaint. KEMP then approached CRAWFORD, who was once again seated, got close to him and said that if he didn't be quiet he would arrest him for disorderly conduct. KEMP was so close to CRAWFORD that spittle from KEMP's mouth landed on CRAWFORD. CRAWFORD told KEMP to stop spitting on him; KEMP said if he talked again he would be arrested. CRAWFORD once again told KEMP to stop spitting on him and KEMP arrested him. The district attorney dismissed the case. CRAWFORD filed a civil suit against both KEMP and the State. The case against the State was dismissed. The Supreme Court of Alaska ruled that KEMP did not have immunity from the civil suit and a jury should hear the case.

WINTERROWD v Nelson et al (Police Officers are Not Entitled to Qualified Immunity if Excessive Force is Used During Routine Traffic Stop) bulletin no 318. Subject was stopped by three police officers who suspected that his license plates were invalid. No other traffic violations occurred. Subject was of the opinion that the State could not force him to have license plates. The police decided to question him in one of the police cars and asked him to put his arms behind his back so that they could pat him down. He complained that he had a sore shoulder. They then forced him onto the hood of the car and forced his arm behind his back. He called them "cowards," "jack-booted thugs," and "armed mercenaries." He brought a civil (1983) suit against the officers alleging excessive force. The officers argued that they were entitled to "qualified immunity." The court disagreed and sent the case back for a jury trial.

SCOTT v Harris (Police High Speed Pursuit Does Not Violate Fourth Amendment) bulletin no. 319. Police forced Harris's vehicle off the road during a high speed chase. Harris was injured to the extent he became a quadriplegic. The police requested qualified immunity and the lower courts denied this request. The U.S. Supreme Court reversed the lower courts stating the actions of the police were reasonable and that

excessive force was not used. They based their decision, in part, on the fact that other innocent drivers and pedestrians were at risk as a result of HARRIS.

ATWATER v City of Lago Vista (Warrantless Arrest For Minor Violations is Permissible) bulletin no. 247. Police arrested ATWATER for failure to keep her children restrained by seatbelts as prescribed by Texas law. She had been warned on a prior occasion, so the officer elected to arrest her rather then issue her a citation. Although the arrest may have been "humiliating," it did not violate the Fourth Amendment.

APDEA, et al v Anchorage (Government Mandated Random Drug Testing Violates Alaska Constitution) bulletin no. 251. City of Anchorage required police officers and firefighters to submit to random drug testing. The State Supreme Court ruled this mandate "unreasonable" under Alaska's Constitution. The policy violates Article I, Section 14 of the Constitution.

State v EUTENEIER (Issuance of Warrant to Seize Evidence of "Violation" or "Infraction" is Permissible) bulletin no. 252. Police obtained a warrant to search a residence for evidence of "minors consuming" alcohol, which is listed by statute as a violation. Because these violations are prosecuted criminally, the issuance of the warrant was justified.

WASSILLIE v State (Hearsay Admitted As Prior Inconsistent Statement) bulletin no. 260. 90 year old assault victim (father of defendant) did not remember event. The investigating officer was allowed to testify as to what the victim told him on the night of the event.

VASKA v. State (Hearsay Admitted As Prior Inconsistent Statement) bulletin no. 271. Defendant was convicted of sexually assaulting a three-year-old girl. His first trial was reversed. At the second trial, he was once again convicted primarily on the hearsay testimony of two witnesses whom the victim had told shortly after the event. At the second trial, the victim could not remember what she had said and was not forced to testify. The hearsay evidence was admitted as a prior and inconsistent statement and doing so did not violate the confrontation clause of the U.S. or Alaska constitutions.

DAVIS v Washington (911 Conversation Admitted as Hearsay as Non-Testimonial) bulletin no. 311. McCottry called 911 to report she had been assaulted by her former boyfriend, Adrian DAVIS. Police responded, saw evidence of injury and arrested DAVIS on a felony charge. McCottry was unavailable at trial to testify. The State admitted the 911 call into evidence. The court said that because the 911 call reported an ongoing emergency, it (the tape) could be played at trial because it was "non-testimonial."

ANDERSON, Joseph v State (Statements Made by Assault Victim at Scene Admitted as Hearsay) bulletin no. 322. Police responded to a report of an assault. On arrival they found the victim, Carroll Nelson, in an apartment. When asked what happened, he told the officers that "Joe hit me with a pipe." The victim was transported to the hospital where he underwent surgery for life threatening injuries. Anderson, who was at the scene, was arrested for felony assault. The victim did not appear at trial to testify. The police officer was allowed to testify to the hearsay statement that "Joe hit me with the pipe" because the primary purpose of the question was to enable the officer to respond to an ongoing emergency. (Like DAVIS above)

HAMMON v Indiana. bulletin no. 311. Police responded to a domestic dispute. When they arrived they found Amy HAMMON on the porch of the residence. She seemed somewhat frightened but told the police that nothing was the matter. Police asked, and received permission to enter the residence. Hershal Hammon, Amy's husband, was in the residence. The police observed broken glass and other items which led them to believe an assault had taken place. They, over the objection of Hershal, separated the two. Amy finally related that Hershal had assaulted her. Hershal was arrested. Amy was subpoenaed to appear at trial but failed to appear. The officer was allowed to testify as to what Amy told him about the assault. The court ruled that because there was no emergency in progress when they (the police) arrived, the hearsay statements were not allowed. This was because the defendant (Hershal) did not have the opportunity to cross-examine Amy.

JAMES v State (Probation Officer Cannot Force Defendant To Give Up 5th Amendment) bulletin no. 270. The defendant was convicted of sexual assault in the second degree and sentenced to ten years with four

suspended on the condition he participate in a sex offender program while incarcerated. He told the therapist "I'm not going to talk about this because basically I didn't do it and I'm under appeal." He was charged with violation of his probation and the four-year probation was revoked. The court said he could not be compelled to give evidence against himself. Not only that, he might have put himself in a position where the State could have charged him with perjury.

SMITH v DOE No. 1 (U.S. Supreme Court Upholds Alaska's Sex Offender Registration Act) bulletin no. 264. The Act is not designed to be punitive nor does its retroactive application violate the ex post facto clause of the United States Constitution.

VENT v State (Voluntary Confession of a Juvenile) bulletin no. 266. Although the 1st of 3 statements was suppressed, it did not taint the remaining two; juvenile made proper MIRANDA waiver and gave volunteered statement; police lied about strength of case and **psychology of police interviews**, juvenile was 17 years and 11 months at the time of his arrest for the robbery, sexual assault and murder of a fifteen year old boy. He was interviewed on 3 occasions. The judge suppressed the first statement, but allowed the remaining two to be admitted. The juvenile had slept and conferred with his mother between 1 & 2 and slept again between 2 & 3. He made a voluntary confession in spite of the fact that the police lied to him about evidence they said they had. The defense expert who was called to testify about the risk of false confessions was not allowed to testify.

HAAG v State (Investigatory Seizure of Armed Robbery Suspect Leads to Show-Up) bulletin no. 298. Police respond to report of two black males wearing dark clothing and ski masks who are in the process of committing home invasion/armed robbery. Police arrive within minutes and see HAAG running from the direction of the victim's residence. Police seize HAAG at gun point and handcuff him. Although he is a white male, he is dressed in black and has on dark gloves. Police transport him back to the scene where a witness identifies him by his size and clothing. Later police find an Rx bottle in the name of the victim in the rear seat of the patrol car where HAAG had been confined. They also find a gun in the area HAAG was running. Court ruled this was a proper investigative seizure and that the subsequent show-up was proper.